IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

HONDA MOTOR CO., LTD.; HONDA R&D CO., LTD.;
AND AMERICAN HONDA MOTOR CO., INC.,

Petitioners,

v.

KARL L. OBERG,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF OREGON

BRIEF OF LEGAL HISTORIANS
DAVID E. CHESTEKOFF, MARK W. HAGER,
BRUCE H. MANN, AND ARTHUR F. McEVOY
AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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March 31, 1994

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF *AMICI CURIAE*. 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. ENGLISH COMMON LAW 4

II. AMERICAN COLONIAL PRACTICE 9

III. AMERICAN PRACTICE IN THE NINETEENTH CENTURY 12

A. The Difference Between Punitive Damages in Tort Cases and Easily Measured Damages in Other Kinds of Cases 14

B. Passion and Prejudice Review 15

C. Honda's Cases Are Not to the Contrary 18

CONCLUSION 19

TABLE OF AUTHORITIES

Cases:	Page
Anon., 95 Eng. Rep. (K.B. 1743)	5
Ash v. Ash, 90 Eng. Rep. 526 (K.B. 1701)	4
Ashley v. Ashley, 93 Eng. Rep. 1088 (K.B. 1740)	5
Barker v. Dixie, 95 Eng. Rep. 180 (K.B. 1735-36)	5
Barry v. Edmunds, 116 U.S. 550 (1886)	12
Beardmore v. Carrington, 95 Eng. Rep. 790 (C.P. 1764)	3-5
Belknap v. Boston & Maine R.R., 49 N.H. 358 (1870)	19
Berks v. Mason, 96 Eng. Rep. 874 (K.B. 1756)	4
Bingham v. Cabot, 3 Dall. 19 (1795)	11
Bright v. Eynon, 97 Eng. Rep. 365 (K.B. 1769)	5
Bruce v. Rawlins, 95 Eng. Rep. 934 (C.P. 1770)	6
Chambers v. Robinson, 93 Eng. Rep. 787 (K.B. 1726)	5
Clark v. Bales, 15 Ark. 452 (1855)	17
Coffin v. Coffin, 4 Mass. 1 (1808)	11, 16
Coleman v. Southwick, 9 John. 45 (N.Y. 1812)	15-16
Collins v. Albany & Schenectady R.R., 12 Barb. 492 (N.Y. Sup. Ct. 1852)	18
Day v. Woodworth, 54 U.S. (13 How.) 363 (1852)	12
Dorsey v. Manlove, 14 Cal. 553 (1860)	15
Duberly v. Gunning, 100 Eng. Rep. 1226 (K.B. 1792)	7-8
Fabrigas v. Mostyn, 96 Eng. Rep. 549 (C.P. 1774)	7, 13
Galloway v. United States, 319 U.S. 372 (1943)	11
Georgia v. Brailsford, 3 U.S. (3 Dall.) 1 (1794)	11
Gilbert v. Burtenshaw, 98 Eng. Rep. 1059 (K.B. 1774)	4
Gilreath v. Allen, 32 N.C. (10 Ired.) 67 (1849)	15
Grey v. Grant, 95 Eng. Rep. 794 (C.P. 1764)	6, 13
Guerry v. Kerton, 18 S.C.L. (2 Rich.) 507 (Ct. App. 1846)	19
Hanckey v. Trotman, 96 Eng. Rep. 1 (K.B. 1746)	5
Hewlett v. Cruchley, 128 Eng. Rep. 696 (K.B. 1813)	8-9
Huckle v. Money, 95 Eng. Rep. 768 (C.P. 1763)	6, 13
Johnson v. Louisiana, 406 U.S. 356 (1972)	11
Leith v. Pope, 96 Eng. Rep. 777 (K.B. 1782)	7
Linsley v. Bushnell, 15 Conn. 225 (1842)	15
McCarthy v. Miskern, 22 Minn. 90 (1875)	19
McWilliams v. Bragg, 3 Wis. 424 (1854)	13

TABLE OF AUTHORITIES (Cont.)

Cases:	Page
Merest v. Harvey, 128 Eng. Rep. 761 (C.P. 1814)	7
Missouri Pacific R. Co. v. Humes, 115 U.S. 512 (1885)	12
New Orleans, J., & Great N.R. Co. v. Hurst, 36 Miss. 660 (1859)	12-13
North v. Cates, 5 Ky. 591 (1812)	16
People v. Croswell, 3 Johns. Cas. 337 (N.Y. 1804)	11
Respass v. Parmer, 2 A.K. Marsh. 365 (Ky. 1820)	13
Roe v. Hawkes, 83 Eng. Rep. 316 (K.B. 1663)	4
Sampson v. Smith, 15 Mass. 365 (1819)	19
Schlencker v. Risley, 4 Ill. 483 (1842)	16
Sharpe v. Brice, 96 Eng. Rep. 557 (C.P. 1774)	6
Sheik v. Hobson, 64 Iowa 146 (1884)	14
Smith v. Huggins, 93 Eng. Rep. 1089 (K.B. 1740)	5
Southern Kansas Ry. Co. v. Rice, 38 Kan. 398 (1888)	17
Southwick v. Stevens, 10 Johns. 442 (N.Y. Sup. Ct. 1813)	14
Sparf v. United States, 156 U.S. 51 (1895)	11
Taylor v. Giger, 3 Ky. 586 (1808)	16
Thompson v. Morris Canal & Banking Co., 2 Harr. 480 (N.J. Sup. Ct. 1840)	18
Thurston v. Martin, 23 F. Cas. 1189 (1830)	17
Tillotson v. Cheetham, 2 Johns. 62 (N.Y. Sup. Ct. 1806)	13
Townsend v. Hughes, 86 Eng. Rep. 994 (C.P. 1677)	5
Travis v. Barger, 24 Barb. 614 (N.Y. App. Div. 1857)	19
Tullidge v. Wade, 95 Eng. Rep. 909 (C.P. 1769)	6
Vanzant v. Jones, 3 Dana. 464 (Ky. 1835)	16
Walker v. Smith, 4 U.S. (4 Dall.) 389 (1804)	17
Whipple v. Cumberland Mfg Co., 29 F. Cas. 934 (1843)	17
Wilford v. Berkeley, 97 Eng. Rep. 472 (K.B. 1758)	5
Wood v. Gunston, 82 Eng. Rep. 867 (Upper Bench 1655)	4
Worster v. Proprietors of Canal Bridge, 33 Mass. 541 (1835)	19

TABLE OF AUTHORITIES (Cont.)

Statutes, Rules and Constitutional Provisions: **Page**

Fifth Amendment . . . . . *passim*
Fourteenth Amendment 3, 12
Act of Feb. 6, 1889, § 6 12

Miscellaneous:

Adams' Diary Notes on the Right of Juries, February 12, 1771, in 1 LEGAL PAPERS OF JOHN ADAMS 230 (WROTH & ZOBEL ed. 1965) 10
D. GRAHAM, A TREATISE ON THE LAW OF NEW TRIALS IN CASES CIVIL AND CRIMINAL (1st ed. 1834) 16
Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966) 10
M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977) 9, 10
LEAMING & SPICER'S LAWS 11
L. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY (1973) 10
Nelson, *The Eighteenth Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893 (1978) 10
R. PERRY, ed., SOURCES OF OUR LIBERTIES 270 (1959) . . . 9
Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 OHIO ST. L. REV. 859 (1991) 10
T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES (1868) 13, 15, 17
J.G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES (1883) 14, 16
Wolfram, *The Constituional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973) 10
W. WYCHE, TREATISE ON THE PRACTICE OF NEW YORK IN CIVIL ACTIONS (1794) 11

IDENTITY AND INTEREST OF *AMICI CURIAE*

This brief is being submitted in support of Respondent by the following legal historians:[1]

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We submit this brief in order to correct the oversimplified and misleading version of the history of judicial review of damages awards described in the Brief of Petitioners Honda Motor Co., *et al.* ("Pet. Br."). It is simply not true that the practice of providing judicial review of the size of all damages

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[1] Consent letters have been filed with the Clerk of this Court.

verdicts, "whether punitive or compensatory," to determine whether they were "excessive or in any other respect opposed to the weight of the evidence," was "well entrenched," Pet. Br. at 3, 12, 16, either at common law or in the United States prior to the framing of the Fourteenth Amendment. The pattern of judicial review was much more limited than Honda describes, and such review was extremely deferential in punitive damages, personal injury, and other cases involving difficult-to-quantify damages. There is no basis for Honda's conclusion that weight-of-the-evidence excessiveness review was a fixture of the common law.

SUMMARY OF THE ARGUMENT

Honda argues that due process requires judicial review "'to re-examine the evidence [before the jury] and set aside a verdict because it [is] excessive or in any other respect opposed to the weight of the evidence.'" Pet. Br. at 3 (citation omitted). Honda claims such a right on the ground that "[b]y the mid-eighteenth century English courts *routinely* set aside excessive damage awards returned by juries; the same approach was uniformly followed by state courts in this country prior to the ratification of the Fourteenth Amendment." *Id.* at 8 (emphasis added). Honda concludes that "Oregon's decision to withhold a safeguard that has been regarded as fundamental in all other Anglo-American jurisdictions from time immemorial must be held to run afoul of the Due Process Clause." *Id.* at 9.

Honda has misread the relevant history. Judicial review to decide whether a punitive damage award in a personal injury tort case is "excessive" insofar as it is against the weight of the evidence was assuredly *not* a safeguard that has been regarded as "fundamental" in Anglo-American jurisdictions "from time immemorial." The reality is precisely the contrary: such review was not available in common-law England; was not available in the United States at the time of the framing of the Fifth Amendment (which of course contains its own Due Process Clause); and was not widely accepted practice among the States when the Fourteenth Amendment was adopted in 1868.

A. Before American independence, common-law courts in England did not grant new trials for excessive damages in tort cases. An English court was able to say in 1764 that "there is not one single case (that is law) in all the books to be found, where the Court has granted a new trial for excessive damages in cases for torts." *Beardmore v. Carrington*, 95 Eng. Rep. 790, 793 (C.P. 1764). The cases on which Honda relies involved jury bribery and other forms of corruption, not simply excessive damages.

B. It is true that, in the last part of the eighteenth century and at the beginning of the nineteenth, the English courts, led by Lord Mansfield, began to assert an increasing ability to control the jury by granting new trials. But this power was ordinarily not employed in punitive damages cases, tort cases, and in other proceedings involving difficult-to-measure damages that required the jury to make qualitative judgments based on all the relevant facts of the case. Even so, the American colonists deeply resented judicial control over the jury and cited such perceived "tyranny" as a primary factor in their grievances against England. Accordingly, the Fifth Amendment was adopted in 1791 against a background assumption that the jury was virtually all-powerful. It was usually vested with ultimate authority in trial courts to decide questions of both law and fact in civil and criminal cases. There is no evidence that any of the framers believed that such procedures were fundamentally unfair or would have violated the Fifth Amendment in the absence of appellate review. Indeed, there was no significant right to appeal in federal criminal cases until the end of the nineteenth century.

C. American practice in the nineteenth century recognized that punitive damages, and other damages in tort cases involving personal injury, were peculiarly within the jury's domain. Accordingly, those cases were subject to extremely deferential review and were reversed, if at all, only when the jury's verdict was so unreasonable or irrational as to suggest that the jury was motivated by passion and prejudice. In fact, the cases that Honda cites in its brief support the *amici's* view of history, rather than Honda's.

ARGUMENT

I. ENGLISH COMMON LAW

Initially, English courts had no power *at all* to grant new trials for perceived "excessiveness" of damages.[2] Gradually they seized such power, but almost exclusively in cases of bribery and other forms of jury corruption. "All or most of the cases of new trials, are where the juries have misdemeaned themselves contrary to their oath; in the case of *[Wood v. Gunston]*, the misconduct of the jury was certainly an ingredient." *Beardmore v. Carrington*, 95 Eng. Rep. 790, 793 (C.P. 1764).[3] *Berks v.*

[2] In *Beardmore v. Carrington*, 95 Eng. Rep. 790 (C.P. 1764), the court explained that "[i]t is clear that the practice of granting new trials is modern and that the Courts anciently never exercised this power. . . . [T]here is not one case to be found in the Year-Books where ever the Court abridged the damages after a principal verdict . . . ." *Id.* at 792.

[3] In *Wood v. Gunston*, 82 Eng. Rep. 867 (Upper Bench 1655), for example, the court observed that "it is frequent in our books for the Court to take notice of miscarriages of juries, and to grant new tryals upon them, and it is for the peoples benefit that it should be so for a jury may sometimes by indirect dealings be moved to side with one party, and not to be indifferent betwixt them"). Thus, with respect to *Wood v. Gunston*, the *Beardmore* court observed that "there is great reason . . . to think [that the grant of a new trial] was for misbehavior of the jury," for "it is highly probable there was some evidence that the jury had been tampered with." *Id.* "[T]his was certainly the very first case of a new trial." *Id.; see also Roe v. Hawkes*, 83 Eng. Rep. 316 (K.B. 1663) ("the new trial was not granted in *Wood and Gunston's case* meerly for the excessiveness of the damages, but because a tampering with the jury was proved").

Similarly, according to *Beardmore*, the new trial in *Ash v. Ash*, 90 Eng. Rep. 526 (K.B. 1701), "was plainly for the misdemeanor of the jury in refusing to answer the Judge when he asked what ground or reason they went upon." *Beardmore*, 95 Eng. Rep. at 793.

In *Gilbert v. Burtenshaw*, 98 Eng. Rep. 1059 (K.B. 1774), Lord Mansfield explained, in denying a rule for new trial in a malicious prosecution action where the jury had awarded £400 in damages, that "[n]ew trials are not to be granted in this class of cases without very strong grounds indeed, and such as carry internal evidence of intemperance in the minds of the jury. It is by no means to be done where the Court may feel, that if they had been on the jury they would have given less damages, or where they might think the jury themselves would have completely discharged their duty, in giving a lesser

Mason, 96 Eng. Rep. 874, 874-75 (K.B. 1756), *Bright v. Eynon*, 97 Eng. Rep. 365, 366, 368 (K.B. 1769), and the other cases on which Honda places primary reliance (Pet. Br. at 13 n.8), did not involve damages issues, and so they offer no support for Honda's assertion that weight-of-the-evidence review of damages for excessiveness was "routine" at common law.[4]

In fact, the *Beardmore* court, in denying a new trial for excessiveness where a jury awarded £1,000 damages for an illegal search and arrest, was able to say in 1764 that "there is not one single case (that is law) in all the books to be found, where the Court has granted a new trial for excessive damages in cases for torts." 95 Eng. Rep. at 793.[5] In *Wilford v.*

sum." *Id.* at 1060.

Contrary to Honda's claim (Pet. Br. at 14 n.9), in *Townsend v. Hughes*, 86 Eng. Rep. 994 (C.P. 1677), the court *refused* to grant a new trial, even though the jury had awarded £4,000 as damages where the defendant had said of the plaintiff: "He is an unworthy man, and acts against law and reason." Chief Justice North explained that "as a Judge he could not tell what value to set upon the honour of the plaintiff, the jury have given four thousand pounds, and therefore he could neither lessen the sum or grant a new trial, especially since by the law the jury are judges of the damages." *Id.* at 994-95. Noting the large verdict in *Townsend*, the *Beardmore* court observed that, "if a Court could not say that those damages were excessive, they can hardly say that damages are excessive in any case of slander whatever." 95 Eng. Rep. at 793.

[4] Even outside the damages context, the practice was that a new trial would not be granted where there was evidence on both sides of the case. *See Hanckey v. Trotman*, 96 Eng. Rep. 1, 1-2 (K.B. 1746); *Anon.*, 95 Eng. Rep. (K.B. 1743); *Ashley v. Ashley*, 93 Eng. Rep. 1088 (K.B. 1740); *Smith v. Huggins*, 93 Eng. Rep. 1089 (K.B. 1740); *Barker v. Dixie*, 95 Eng. Rep. 180, 180-81 (K.B. 1735-36).

[5] The court explained that *Chambers v. Robinson*, 93 Eng. Rep. 787 (K.B. 1726), "seems to be the only case where ever a new trial was granted merely for the excessiveness of damages only; we are not satisfied with the reason given in that case, and think it of no weight, and want to know the facts upon which the Court could pronounce the damages to be excessive. The principle on which it was granted, mentioned in [the reporter], was to give the defendant a chance of another jury: this is a very bad reason; for if it was not, it would be a reason for a third or fourth trial, and would be digging up the constitution by the roots; and therefore we are free to say this case is not law." *Beardmore*, 95 Eng. Rep. at 793.

Berkeley, 97 Eng. Rep. 472 (K.B. 1758), for example, the jury gave £500 in damages against the defendant in a case for criminal conversation. The defendant moved for a new trial on the ground that he was a "clerk in low circumstances" and unable to pay such a sum. But the Court refused to grant even a rule to show cause, "because in cases of tort the jury are the only proper judges of the damages."[6]

Gradually, in the late eighteenth and early nineteenth centuries, English courts became more willing to grant new trials on grounds of damages in certain cases involving easily measured injuries, such as loss of goods with a defined market value.[7] The English courts continued to be quite reluctant to grant new trials for excessive damages in tort cases, particularly those involving

[6] *See also Huckle v. Money*, 95 Eng. Rep. 768, 768 (C.P. 1763) ("the law has not laid down what shall be the measure of damages in actions of tort; the measure is vague and uncertain, depending upon a vast variety of causes, facts, and circumstances; torts or injuries which may be done by one man to another are infinite; in cases of criminal conversation, battery, imprisonment, slander, malicious prosecution, etc., the state, degree, quality, trade or profession of the party injured, as well as the person who did the injury, must be, and generally are, considered by a jury in giving damages. The few cases to be found in the books of new trials for torts, shews that Courts of Justice have most commonly set their faces against them; and the Courts interfering in those cases would be laying aside juries"); *Grey v. Grant*, 95 Eng. Rep. 794, 795 (C.P. 1764) (refusing to grant new trial for excessiveness where £200 was awarded in battery case, and noting that jury "are the proper judges of the damages"); *Tullidge v. Wade*, 95 Eng. Rep. 909, 909 (C.P. 1769) (refusing to grant new trial where jury awarded £50 to father for assault on his daughter, and commenting that, "although the plaintiff's loss in this case may not really amount to the value of twenty shillings, yet the jury have done right in giving liberal damages"); *Bruce v. Rawlins*, 95 Eng. Rep. 934, 934 (C.P. 1770) (rejecting motion for new trial on grounds of excessiveness where £100 was awarded for illegal search, explaining that defendants "know the risk they run by such conduct, and must take the consequences that fall upon them by the verdict of the jury").

[7] *E.g.*, *Sharpe v. Brice*, 96 Eng. Rep. 557, 557 (C.P. 1774) ("the same rule does not prevail upon questions of tort, as of contract. In contract the measure of damages is generally [a] matter of account, and the damages given may be demonstrated to be right or wrong. But in torts a greater latitude is allowed to the jury: and the damages must be excessive and outrageous to require or warrant a new trial").

exemplary damages or injuries to the person.[8] There, the fact that the jury's judgment was intrinsically qualitative and discretionary dissuaded courts from granting new trials in all but the most exceptional cases, such as where the jury's verdict was clearly the result of passion or prejudice.[9]

Thus, in *Duberly v. Gunning*, 100 Eng. Rep. 1226 (K.B. 1792) — which Honda rather surprisingly cites in support of its argument, Pet. Br. at 14 n.9 — the court denied a motion for new trial based on supposedly excessive damages in a criminal conversation case, where the jury had awarded £5,000 even though the plaintiff had apparently consented to the infidelities of his wife and had himself committed adultery. Justice Ashhurst explained:

> Where damages depend in any wise, upon calculation, the Court have some medium to direct them, by which they are enabled to correct any mistake of the jury. But where there is no such light to guide them, where the damages depend upon mere sentiment and opinion, the Court have no line to go by; and therefore it

[8] *E.g.*, *Merest v. Harvey*, 128 Eng. Rep. 761, 761 (C.P. 1814) (denying new trial for excessiveness where jury awarded £500 for hunting game on plaintiff's estate, and explaining that "I do not know upon what principle we can grant a rule in this case, unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage that the Plaintiff may sustain" and adding that "I remember a case where a jury gave £500 damages for merely knocking a man's hat off; and the Court refused a new trial").

[9] *E.g.*, *Fabrigas v. Mostyn*, 96 Eng. Rep. 549, 549 (C.P. 1774) ("[A]s to the excess of damages, the Court were all of opinion, that it was very difficult to interpose with respect to the quantum of damages in actions for any personal wrong. Not that it can be laid down, that in no case of personal injury the damages can be excessive. Some may be so monstrous and excessive, as to be in themselves an evidence of passion or partiality in the jury. In the present case the injury was great, and the jury (not the Court) are to estimate the adequate satisfaction. No prejudice or misbehaviour of any kind are or can be imputed to the jury"); *Leith v. Pope*, 96 Eng. Rep. 777, 778 (K.B. 1782) ("in cases of tort the Court will not interpose on account of the largeness of damages, unless they are so flagrantly excessive as to afford an internal evidence of the prejudice and partiality of the jury").

> would be very dangerous for us to interfere. We have no right in such a case to set up our own judgment against that of the jury, to which the constitution has referred the decision of the question of damages. There is another consideration, deserving of great weight; which is, that the Court [has] never granted a new trial in such a case as this for excessive damages; and yet many instances have occurred where the damages have been confessedly excessive.

Id. at 1228.[10]

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[10] Lord Kenyon added:

> According to my judgment of this case, I think the damages are a great deal too much: nay, I should have been satisfied even if nominal damages only had been given; but as the jury have formed a different judgment upon the evidence, I know not why my judgment should be preferred to theirs upon such a subject. . . . We have known instances of much greater damages than these given in these kinds of cases, which were never got rid of by granting new trials. Knowing therefore no instance in which a new trial has ever been granted in such a case, upon the ground of excessive damages, and the opinion of the Courts having leaned strongly against such interference, even in cases which seemed to call for it as well as this, I confess, although I feel great difficulties on the one side as well as the other, I have not courage enough to make the first precedent of granting new trials under such circumstances as the present.

100 Eng. Rep. at 1228. Justice Grose agreed that "[i]t is material to observe, that there is no instance in which the Courts have ever granted a new trial under such circumstances as the present." *Id.* at 1229. He posed the question:

> But what line have we to go by in declaring that the damages to be too much or too little? We have known many of these cases, where very large damages have been given, particularly one of £10,000 against a person in the situation of a servant. If any thing could have warranted the interference prayed for, we may fairly presume it was that; and yet no new trial was granted.

Id. at 1230. Although Lord Mansfield stated in *Hewlett v. Cruchley*, 128 Eng. Rep. 696 (K.B. 1813), that "it is now acknowledged in all the courts of Westminster-hall that . . . if damages are clearly too large, the Court will send

II. AMERICAN COLONIAL PRACTICE

Around the time of the American Revolution, English judges began to assert greater powers over the jury, and the trend triggered harsh criticism from the colonists. "The award of new trials for any reason [was] regarded with profound suspicion by the revolutionary generation. 'The practice of granting new trials,' a Virginia judge noted in 1786, 'was not a favourite of the courts of England' until the elevation of Lord Mansfield, 'whose habit of controling juries does not accord with the free institutions of this country.'" M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 142 (1977). The jury was held in high regard by the colonists, and the Crown's infringements of the common-law entitlement to jury trial were cited in many of the revolutionary complaints against George III.[11] The controversy surrounding the Constitution's omission of any specific guarantee of the right to trial by jury in civil cases is well known. Professor Wolfram has noted that "the entire issue of a Bill of Rights was precipated at the Philadelphia

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the inquiry to another jury," *id.* at 698, it is significant that Lord Mansfield voted to *deny* a new trial in that case. He stressed that "it is extremely difficult to estimate damages; you may take twenty juries, and every one of them will differ, from £2,000 down to £200. I have always felt that it is extremely difficult to interfere and say when damages are too large." *Id.* Lord Mansfield's approach was a narrow one: "There are some damages so large, that it is impossible but that every man must acknowledge that they are too large." *Id.*

[11] Among the resolutions adopted by the First Congress of the American Colonies (the Stamp Act Congress) on October 19, 1765 — resolutions deemed by their authors to state "the most essential rights and liberties of the colonists," R. PERRY, ED., SOURCES OF OUR LIBERTIES 270 (1959) — was the declaration "[t]hat trial by jury is the inherent and invaluable right of every British subject in these colonies." The First Continental Congress, in the resolve of October 14, 1774, announced "[t]hat the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law." PERRY, *supra*, at 288. The Declaration of Independence stated solemn objections to the King's making "Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries" and to his "depriving us in many cases, of the benefits of Trial by Jury."

Convention by an objection that the document under consideration lacked a specific guarantee of jury trial in civil cases."[12]

Indeed, so strong was respect for the jury that it was usually afforded the power at trial to decide questions of both law and fact.[13] For example, William Wyche wrote in his 1794 treatise

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[12] Wolfram, *The Constitutional Seventh Amendment*, 57 MINN. L. REV. 639, 657 (1973). "The institution of jury trial in civil cases was a familiar and well-ensconced feature of pre-1787 political life. . . . In fact, '[t]he right of trial by jury was probably the only one universally secured by the first American state constitutions.'" *Id.* at 653; *see also* Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 295 (1966) ("The almost complete lack of any Bill of Rights was a principal part of the Anti-Federalist attacks on the Constitution and the lack of provision for civil juries was a prominent part of this argument").

[13] "The view that even in civil cases 'the jury [are] the proper judges not only of the fact but the law that [is] necessarily involved' was widely held even by conservative jurists at the end of the eighteenth century." HORWITZ, *supra*, at 142 (quoting 1 Z. SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 410 (1795)); *see also* L. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 150-53 (1973); Nelson, *The Eighteenth Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 904 (1978); Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 OHIO ST. L. REV. 859, 899-900 (1991); John Adams, who was Chief Justice of the Massachusetts Supreme Judicial Court as well as patriot and President, wrote that:

> The general Rules of Law and common Regulations of Society, under which ordinary Transactions arrange themselves, are well enough known to ordinary Jurors.
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> * * *
>
> Now should the Melancholly Case arise, that the Judges should give their Opinions to the Jury, against one of these fundamental Principles, is a Juror obliged to give his Verdict generally according to this Direction, or even to find the fact specially and submit the Law to the Court. Every Man of any feeling or Conscience will answer, no. It is not only his right but his Duty in that Case to find the Verdict according to his own best Understanding, Judgment and Conscience, tho in Direct opposition to the Direction of the Court.

Adams' Diary Notes on the Right of Juries, February 12, 1771, in 1 LEGAL

on New York practice that "[t]he jury may in all cases, where law and fact are blended together, take upon themselves the knowledge of the law." W. WYCHE, TREATISE ON THE PRACTICE OF THE SUPREME COURT OF JUDICATURE OF THE STATE OF NEW YORK IN CIVIL ACTIONS 168 (1794). Chief Justice John Jay, in trying a case under the Court's original jurisdiction, instructed the jury that it had the power "to determine the law as well as the fact in controversy." *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794). In *People v. Croswell*, 3 Johns. Cas. 337, 368 (N.Y. 1804), Judge (later Chief Justice and Chancellor) Kent wrote that "[t]he law and fact are so involved, that the jury are under an indispensable necessity to decide both, unless they separate them by a special verdict. This right in the jury to determine the law as well as the fact has received the sanction of some of the highest authorities in the law." The infamous Sedition Act of 1798 stated that "the jury who shall try the cause shall have a right to determine the law and the fact, under the direction of the court, as in other cases." 1 Stat. 597. *See also Bingham v. Cabot*, 3 Dall. 19, 33 (1795) (Iredell, Circuit Justice); *Coffin v. Coffin*, 4 Mass. 1, 25 (1808); *Sparf v. United States*, 156 U.S. 51, 142-68 (1895) (Gray, J., dissenting); *Galloway v. United States*, 319 U.S. 372, 399-400 (1943) (Black, J., dissenting); *Johnson v. Lousiana*, 406 U.S. 356, 374 n.11 (1972) (Powell, J., concurring).

There is no evidence that any of the framers believed that giving such power to the jury produced trials that were fundamentally unfair, or that such proceedings would have

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PAPERS OF JOHN ADAMS 230 (WROTH & ZOBEL ed. 1965).

For example, in New Jersey, by Provincial laws of 1676 and 1681, it was not only enacted "that the trial of all causes, civil and criminal, shall be heard and decided by the verdict of twelve honest men of the neighborhood," but also "that there shall be, in every court, three justices or commissioners, who shall sit with the twelve men of the neighborhood, with them to hear all causes, and to assist the said twelve men of the neighborhood in case of law; and that they the said justices shall pronounce such judgment as they shall receive from, and be directed by the said twelve men, in whom only the judgment resides, and not otherwise." LEAMING & SPICER'S LAWS, pp. 396-398, 428, 429.

violated the Fifth Amendment in the absence of appellate review. Indeed, appellate review could hardly have been used to check jury power in federal criminal cases, because there was no right of appeal from federal convictions until 1889, when Congress granted a writ of error in capital cases,[14] which was extended in 1891 by the Evarts Act to "otherwise infamous crimes." It would be odd if the practice of near-total deference to the jury, which existed at the time of the framing of the Fifth Amendment's Due Process Clause, were held to violate that Clause's counterpart in the Fourteenth Amendment.

III. AMERICAN PRACTICE IN THE NINETEENTH CENTURY

Even in the nineteenth century, personal injury tort awards and punitive damage verdicts were reviewed extremely deferentially, if at all. American courts observed the rule that such damages were the jury's domain. *See, e.g., Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1852) (assessment of punitive damages "has always been left to the discretion of the jury"); *Missouri Pacific R. Co. v. Humes*, 115 U.S. 512, 521 (1885) ("The discretion of the jury in such cases is not controlled by any very definite rules; yet the wisdom of allowing such additional damages is attested by the long continuance of the practice"); *Barry v. Edmunds*, 116 U.S. 550, 565 (1886) ("For nothing is better settled than that, in such cases as the present, and other actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict").

Thus, in *New Orleans, J., & Great N.R. Co. v. Hurst*, 36 Miss. 660 (1859), the court refused to grant a new trial for excessiveness where the jury awarded $4,500 against a railroad company when a conductor carried a passenger 400 yards beyond the railway station and forced him to walk back. The court expressed grave "regret" as to the size of the verdict, but explained that "the law furnishes no legal rule of measurement

[14] *See* Act of Feb. 6, 1889, § 6, 25 Stat. 655, 656.

[for exemplary damages], save [the jury's] discretion" and that "[i]t is not enough that, in the opinion of the court, the damages are too high. It may not rightfully substitute its own sense of what would be a reasonable compensation for the injury, for that of the jury." *Id.* at 666.[15]

[15] In *McWilliams v. Bragg*, 3 Wis. 424 (1854), the Wisconsin Supreme Court traced the judicial deference owed to damage assessments by juries in cases of personal injury and punitive damages, to early English precedent. The court summarized a number of leading English decisions, beginning with *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763):

> In an action for assault and imprisonment where the jury gave a verdict for £300, a motion for a new trial was denied, although it was supposed [that] £20 would have been sufficient damages for the mere injury. The court in that case declared, that the law had not laid down what should be the measure of damages in such actions — that it was vague and uncertain, depending upon a variety of causes, facts and circumstances.

3 Wis. at 427. The Wisconsin court then noted *Grey v. Grant*, 95 Eng. Rep. 794 (C.P. 1764), where, "in a case of assault and battery, [the English court] said, the jury were the proper judges of the damages." 3 Wis. at 427. Summarizing the decision in *Fabrigas v. Mostyn*, 96 Eng. Rep. 549 (C.P. 1774), the Wisconsin Court explained:

> Upon a motion for a new trial, ... the court of common pleas said it was very difficult to interpose with respect to the *quantum* of damages in actions for any personal wrong. "In the present case, (says Chief Justice De Grey), the injury was great, and the jury (not the court) are to estimate the adequate satisfaction." This was also an action for trespass and false imprisonment and a verdict for £3,000 damages was not disturbed.

3 Wis. at 427-28; *see also* T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 535 (1868) (referring to "the wide range always given the jury in actions of tort"); *id.* at 545 ("where circumstances of aggavation are proved the jury are the necessary as well as rightful judges of the amount of relief" in the form of punitive damages); *Respass v. Parmer*, 2 A.K. Marsh. 365, 365 (Ky. 1820) (denying new trial motion on the ground that "[i]n torts the jury are the exclusive judges of the damages"); *Tillotson v. Cheetham*, 2 Johns. 62, 74 (N.Y. Sup. Ct. 1806) (denying new trial motion on excessiveness grounds in slander case with the comment, "[w]e have no standard by which we can measure the just amount, and ascertain the excess. It is a matter residing in

A. The Difference Between Punitive Damages in Tort Cases and Easily Measured Damages in Other Kinds of Cases

American courts observed the important difference between (a) punitive damages and (b) damages susceptible to easy measurement, as in breach of contract cases concerning goods of readily defined market values. As Sutherland explained:

> In many cases of tort, . . . the injury complained of is of such a nature that compensation cannot be awarded by any precise pecuniary standard, and there is no legal measure of damages; because the injury does not consist of any pecuniary elements, or elements of which the value can be measured or expressed in money. . . . Where there is a legal measure of damages, the jury must determine the amount as a fact, according to that measure. . . . [I]f the injury was done with malice, by positive fraud, oppression or wanton violence, such measure, if any, while not entirely ignored, ceases to be a limit on recovery. The jury are at liberty, in the exercise of their judgment, on finding such malice or other aggravation, to give additional damages . . . .

1 J.G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES 2-3 (1883). The measure of damages was a question of law, and therefore within the court's dominion, only "[w]here the plaintiff complains of no injury to his person or his feelings; where no malice is shown; where no right is involved beyond a mere question of property; [and] where there is a clear standard for the measure of damages, and no difficulty in applying it." 3 J.G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES 470

the sound discretion of the jury"); *Southwick v. Stevens*, 10 Johns. 442, 446 (N.Y. Sup. Ct. 1813) (denying motion for new trial in libel case, noting that amount of damage "was for the jury to determine"); *Sheik v. Hobson*, 64 Iowa 146, 148 (1884) ("the question whether punitory damages shall be assessed, and the amount of the assessment, is left to the discretion of the jury").

(1883).[16]

B. Passion and Prejudice Review

To be sure, damage awards in personal injury and punitive damages cases were not entirely beyond judicial control. But courts did not review such awards according to whether they were against "the weight of the evidence." Courts typically inquired only as to whether the amount of the award was so unreasonable that it could be said to be the product of "passion and prejudice" on the jury's part.

Theodore Sedgwick explained the distinction between such "passion and prejudice" review and the weight-of-the-evidence standard: "[t]here is a cloud of cases going to show conclusively, that although the courts are entirely satisfied that the damages are excessive, and altogether beyond a compensation for the actual loss sustained, they will not, on a motion for a new trial, interfere with the finding, unless the verdict is so extravagant as to bear evident marks of prejudice, passion, or corruption." T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 533 (1868). As a Kentucky court explained in a battery case, "mere

[16] *See also Coleman v. Southwick*, 9 John. 45, 52 (N.Y. 1812) ("The courts say there is a great difference between cases of damage which can certainly be seen, and such as are ideal, as between assumpsit, trespass for goods, etc., where the sum and value may be measured, and actions of false imprisonment, malicious prosecution, slander, and other personal torts, where the damages are matter of opinion. The law has not laid down what shall be the measure of damages in actions of tort. The measure is vague and uncertain, depending on a vast variety of causes, facts and circumstances . . . Generally, in such cases, [the courts] cannot say whether five hundred pounds was too much, or fifty pounds would have been too little"); *Dorsey v. Manlove*, 14 Cal. 553, 556, 558 (1860) ("in an ordinary case of trespass, unaccompanied by any evil intent or improper motive, . . . [the law] limits the recovery to the value of the property with interest. . . . But where the trespass is committed from wanton or malicious motives, . . . the rule of compensation is not adhered to, and the measure and amount of damages are matters for the jury alone"); *Gilreath v. Allen*, 32 N.C. (10 Ired.) 67, 69 (1849) ("[i]njuries, sustained by a personal insult, or an attempt to destroy character, are matters, which cannot be regulated by dollars and cents," and juries "are allowed such full discretion as to make verdicts to deter others from flagrant violations of social duty"); *Linsley v. Bushnell*, 15 Conn. 225, 235-36 (1842).

excessiveness of damages will not entitle a party to a new trial, unless it be so enormous as, *per se*, to indicate passion or prejudice in the assessment." *Vanzant v. Jones*, 3 Dana. 464, 465 (Ky. 1835).[17]

[17] *See also* 3 J.G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES 469 (1883) ("When the allowance of [punitive] damages has been submitted to the jury, the amount which they think proper to allow will be accepted by the court, unless so exhorbitant as to indicate that they have been influenced by passion, prejudice or a perverted judgment"); D. GRAHAM, A TREATISE ON THE LAW OF NEW TRIALS IN CASES CIVIL AND CRIMINAL 452 (1st ed. 1834) ("The law favors the presumption that the jury are actuated by pure motives. It therefore makes every allowance for different dispositions, capacities, views, and even frailties, in the examination of heterogeneous matters of fact, where no criterion can be supplied; and it is not until the result of the deliberations of the jury appears in a form calculated to shock the understanding, and impress no dubious conviction of their prejudice and passion, that courts have felt themselves compelled to interfere"); *Coffin v. Coffin*, 4 Mass. 1, 41 (1808) ("one case is where the law recognizes some fixed rules and principles in measuring the damages, whence it may be known that there is an error in the verdict. In this case are included actions on contracts, or for torts done to property, the value of which may be ascertained by evidence. The other case includes actions for personal injuries, where no rules are prescribed by law for ascertaining the damages, but from the exorbitancy of them the Court must conclude that the jury acted from passion, partiality, or corruption — causes which naturally produce error or injustice. But to enable the Court to draw this conclusion, it is not enough, that in their opinion the damages are too high, or that much less damages would have been a sufficient satisfaction to the plaintiff; for the law has not intrusted the Court with a discretion to estimate the damages, but has devolved the power on a jury, as a matter of sentiment and feeling, to be exercised by them according to their sound discretion, duly weighing all the circumstances of the case"); *Taylor v. Giger*, 3 Ky. 586, 587 (1808) (denying new trial and commenting that, "[i]n actions for tort, sounding purely in damages, where there is no certain criterion to go by, a new trial ought not to be granted for excessiveness of damages, unless the damages found are so enormous as to shew that the jury were under some improper influence, or were led astray by the violence of prejudice or passion. ... [O]therwise, the verdict of the jury, must, in all cases, depend on the opinion of the judge, and the constitutional trial by jury, will be prostrated"); *Coleman v. Southwick*, 9 John. 45, 52 (N.Y. 1812) ("The damages. .. must be so excessive as to strike mankind, at first blush, as being beyond all measure, unreasonable, and outrageous"); *North v. Cates*, 5 Ky. 591, 593 (1812) (explaining that "the damages ought not to be weighed in a nice balance, but must be such as appear at first blush to be outrageous, and indicate passion or partiality in the jury, to authorise the granting of a new trial"); *Schlencker v. Risley*, 4 Ill. 483, 487 (1842) (affirming denial of new trial motion and explaining that "[c]ourts have always manifested a reluctance to disturb verdicts on account of excessive damages in [tort cases], and never disturb them unless it is probable, from the amount of the damages assessed, that the jury have acted under the influence of passion and prejudice"); *Clark v. Bales*, 15 Ark. 452, 459 (1855) (denying motion for new trial because award was not "so exorbitant as to indicate corruption, or bad faith on the part of the jury"); *Southern Kansas Ry. Co. v. Rice*, 38 Kan. 398, 404 (1888) (affirming jury award with the comment that "the damages are not so excessive as to indicate passion and prejudice on the part of the jury").

Early decisions by Justices of this Court also illustrate the principle. In *Walker v. Smith*, 4 U.S. (4 Dall.) 389 (1804), for example, Justice Washington, as Circuit Justice, denied a new trial motion on the ground that, "although he was not satisfied with the verdict, nor should he have assented to it as a juror; yet, the question of damages, or of interest in the nature of damages, belonged so peculiarly to the jury, that he could not allow himself to invade their province." *Id.* at 391.[18] In *Thurston v. Martin*, 23 F. Cas. 1189, 1190 (1830), Justice Story explained that "[t]he damages are certainly higher than what, had I sitten on the jury, I should have been disposed to give; and I should now be better satisfied, if the amount had been less. . . . The jury were, however, left at liberty to consider all the circumstances of the case, which might, in their opinion, enhance the right to damages . . . . It is one thing for a court to administer its own measure of damages in a case properly before it, and quite another thing to set aside the verdict of a jury, merely because it exceeds that measure. . . . Upon a mere matter of damages, where different minds might, and probably would, arrive at different results, and nothing, inconsistent with an honest exercise of judgment, appears, I, for one, should be disposed to leave the verdict, as the jury found it."[19]

[18] Sedgwick quotes Justice Washington as declaring in this case that "I admit that in cases where merely vindictive damages are sued for, the jury act without control on the subject of damages; because there is no legal rule by which they can be measured; and unless they are so extravagant as to induce a suspicion of improper conduct, the court will not interfere." T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 525 (1868).

[19] *See also Whipple v. Cumberland Mfg Co.*, 29 F. Cas. 934, 937-38 (Story, Circuit Justice) ("the general rule, now established, [is] that a verdict will not be set aside in a case of tort for excessive damages, unless the court

C. Honda's Cases Are Not to the Contrary

None of Honda's cases is to the contrary. In fact, many of the cases Honda cites contradict its historical claims.

For example, Honda cites (Pet. Br. at 16 n.10) *Thompson v. Morris Canal & Banking Co.*, 2 Harr. 480 (N.J. Sup. Ct. 1840), which granted a new trial in a case involving trespass to land, on the ground that "trespass to land, not being of an ideal but of a visible tangible nature, admits of measurement and appraisal, so nearly certain, that honest minds seldom differ much about the amount." *Id.* at 483. But the court noted that the rule was very different in other cases: "equivalents being not clearly ascertainable in such personal torts as battery, slander, seduction, deceits, and frauds, for want of any certain measure to go by, damages must be adjusted in such actions according to the circumstances of the case, by the discretion of a jury; and though all verdicts are subject to legal control, *they are never disturbed by a court*, where the jury, as in those cases, have no rule to go by, 'unless the damages given are flagrantly and outrageously excessive, manifestly showing the jury to have been actuated by passion, partiality, corruption, or prejudice.'" *Id.* at 482 (citation omitted).

Honda also relies on (Pet. Br. at 15-16 n.10) *Collins v. Albany & Schenectady R.R.*, 12 Barb. 492, 495 (N.Y. Sup. Ct. 1852), which stressed that "[i]t is the peculiar province of a jury to assess damages, and where, as in actions sounding in damages merely, the law furnishes no legal rule of admeasurement, it is very rare indeed, that a court will feel itself justified in setting aside a verdict, merely for excess. It is not enough that, in the opinion of the court, the damages are too high. It may not, rightfully, substitute its own sense of what would be a reasonable compensation for the injury, for that of the jury . . . . In

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can clearly see that the jury have committed some very gross and palpable error, or have acted under some improper bias, influence, or prejudice, or have totally mistaken the rules of law, by which the damages are to be regulated. . . . [I]n no case will the court ask itself, whether, if it had been substituted in the stead of the jury, it would have given precisely the same damages").

actions, involving moral delinquency on the part of the defendant, examples are very rare, in which the damages have been found to be so excessive as to induce the court to order a second trial."[20]

CONCLUSION

History does not support Honda's argument. "Excessiveness" review of punitive damages according to a weight-of-the-evidence standard is not part of the Anglo-American legal tradition.

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[20] The other cases cited by Honda in Pet. Br. at 15-16 n.10, do not support its argument:

- *Sampson v. Smith*, 15 Mass. 365 (1819), referred to the need for new trials when "jurors are liable to have their passions excited" and nonetheless cautioned that the authority to grant new trials "ought to be exercised with great caution and discretion." *Id.* at 367.
- *Travis v. Barger*, 24 Barb. 614 (N.Y. App. Div. 1857), *denied* a motion for new trial, explaining that "the damages were not so flagrantly outrageous and extravagant, as necessarily to evince intemperance, passion, partiality or corruption on the part of the jury; and that, where that is not the case, the court will not undertake to set their judgment on a question of damages, in an action of this nature, in opposition to the judgment of the jury." *Id.* at 629.
- *Worster v. Proprietors of Canal Bridge*, 33 Mass. 541 (1835), *denied* a motion for new trial on excessiveness grounds, observing that damages in personal injury cases are "peculiarly within the province of the jury to determine," noting that "the judgment of the jury and not the opinion of the Court is to govern," and referring to jury "partiality or prejudice" as a basis for granting a new trial. *Id.* at 547.
- *Belknap v. Boston & Maine R.R.*, 49 N.H. 358 (1870), granted a new trial trial because "[w]e think it evident that the jury were affected by partiality or prejudice from some cause." *Id.* at 374.
- *Guerry v. Kerton*, 18 S.C.L. (2 Rich.) 507 (Ct. App. 1846), was a trover case — i.e., the wrongful conversion of property belonging to another — where the measure of damages was always a matter of law.
- In *McCarthy v. Miskern*, 22 Minn. 90 (1875), the court was convinced that "the verdict was not assessed with a view to [the evidence] alone," *id.* at 92 — *i.e.*, that the jury was prejudiced by extrinsic factors.

Respectfully submitted

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March 31, 1994